

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)

)
)
) Docket No. 21-CRB-0001-PR
) (2023-2027)
)
)
)

**AMAZON AND SPOTIFY'S MOTION TO COMPEL
THE COPYRIGHT OWNERS TO PRODUCE DOCUMENTS
ABOUT THEIR NEW REBUTTAL BENCHMARKS**

The Judges should compel the Copyright Owners to produce documents related to the foreign licensing agreements and the [REDACTED] the Copyright Owners belatedly invoke as benchmarks in their Written Rebuttal Statement.¹ The Copyright Owners did not cite any of these licenses in their direct submission. As the Services explain in pending motions, the Copyright Owners' reliance on these licenses in "rebuttal" testimony is improper because it lacks a nexus to any Service's direct case or is barred by the licenses themselves.² But unless and until the Judges strike this improper testimony, the Services are entitled to a full evidentiary record about these agreements, including "*evidence and analysis to determine the true economic value of the transaction[s]*." *Web V* Final Determination at 33-34, Dkt. No. 19-CRB-0005-WR (2021-25) (*Web V*) (July 22, 2021) ("*Web V* Final Determination").³

¹ Spotify joins this Motion as to documents related to foreign licensing agreements (Rebuttal Requests 33-36, 38, 40-46, 48-49).

² See Amazon's Mot. to Strike, or in the Alternative to Submit Suppl. Test., Concerning the [REDACTED] (May 5, 2022) ("Amazon's Mot. to Strike"); Services' Mot. to Strike, or in the Alternative to Submit Suppl. Test. Concerning, Mr. Bebawi's Improper Rebuttal Testimony and Accompanying Exs. (May 13, 2022) ("Services' Mot. to Strike").

³ Should the Judges grant either of the pending motions to strike, the related portions of this Motion will be moot.

To develop this evidentiary record, Amazon and Spotify seek documents related to the Copyright Owners’ new proposed benchmark agreements, including documents analyzing the agreements and valuing their terms. *See* Smith Decl., Ex. 1 (Amazon and Spotify’s Set of Rebuttal Reqs. for Produc. of Docs. to the Copyright Owners (May 3, 2022) (as corrected on May 16, 2022) (“Rebuttal Requests” or “Requests”). In response, and compounding the impropriety of the Copyright Owners’ submission of these licenses as “rebuttal,” the Copyright Owners have issued a near-blanket refusal to produce documents related to the foreign license agreements. As for the [REDACTED], the Copyright Owners have tentatively agreed to produce only documents assigning specific monetary value to the contract terms. But they have not actually produced any such documents – it remains unclear if and when they will – and they have refused to produce other substantive analyses of the licenses, including documents about [REDACTED].

The Copyright Owners cannot have it both ways, on the one hand relying on new agreements as benchmarks at the eleventh hour, and on the other refusing to produce discovery about those agreements. The Services are entitled to full and fair discovery into them. To be clear, the Judges should strike all of this testimony and moot this Motion. But until they do, they should compel the Copyright Owners to produce responsive documents related to the agreements the Copyright Owners invoke as rebuttal benchmarks.

BACKGROUND

The Copyright Owners’ Written Rebuttal Statement contains testimony about several agreements that were not addressed in any participant’s direct submission. Sony’s Antony Bebawi testifies about Sony’s European licenses and their terms, and more generally about

licensing in Europe and the “European digital music market.” Bebawi WRT ¶¶ 1, 8-23. David Kokakis, ██████ Chief Counsel, and Jeffrey Eisenach, one of the Copyright Owners’ experts, both testify about ██ and the terms and value of those deals, *see* Kokakis WRT ¶¶ 1, 8 n.5, 16, 21-22; Eisenach WRT ¶¶ 113-119, even though the license agreements ██, *see* Amazon’s Mot. to Strike at 8-12.

None of this testimony is tied to any Service’s rate proposal or direct testimony, nor was any of it raised in the Copyright Owners’ direct case.

Although motions to strike that testimony are pending, Amazon and Spotify seek discovery related to the Copyright Owners’ testimony. *See* Smith Decl., Ex. 1. Rebuttal Requests 33-36, 38, 40-46, and 48-49 seek documents related to the Copyright Owners’ foreign licensing agreements and the “European digital music market” that Mr. Bebawi describes. *Id.* at 17-19. The Copyright Owners objected extensively, agreeing only to produce Sony’s documents related to “the ratio between Mechanical Royalties and Performance Royalties in jurisdictions outside the United States” (Request 35) and “similarities or differences between the U.S. digital music market and the European digital music market” (Request 45). *See* Smith Decl., Ex. 2 at 20-28 (Copyright Owners’ Resps. & Objs. to Rebuttal Requests (May 13, 2022)). The Copyright Owners refused to produce any other publisher’s documents regarding these two topics. They also refused to produce *any* documents from *any* publisher (including Sony) in response to the other Requests related to Mr. Bebawi’s testimony.

Rebuttal Requests 105-108 seek “analyses, projections, approval memoranda, presentations, and email[s]” related to the “negotiation, valuation, terms, or internal approval” of [REDACTED], including several specific clauses in those agreements. *See* Smith Decl., Ex. 1 at 27-28. The Copyright Owners objected

and refused to produce any documents in response, except for the “approval memoranda” concerning those licenses. Smith Decl., Ex. 2 at 48-50.

The parties met and conferred about the Rebuttal Requests. Amazon proposed a compromise on Requests 33-36, 38, 40-46, and 48-49, offering to limit them to agreements in the United Kingdom, Germany, France, Sweden, Netherlands, Italy, Japan, and Canada. *See* Smith Decl., Ex. 3 at 8 (May 17, 2022 6:57 PM Email from J. Branson to Counsel for Copyright Owners). The Copyright Owners rejected Amazon’s proposal and stood on their refusal to produce responsive documents. *See* Smith Decl., Ex. 3 at 3 (May 19, 2022 5:48 PM Email from M. Harris to J. Branson (“May 19 Harris Email”)). In addition to the list above, the Requests also seeks documents relating to additional Tier 1 countries and territories, including [REDACTED]

[REDACTED]
[REDACTED].

Amazon also proposed that, for Requests 105-108, the Copyright Owners run targeted searches through the files of two custodians, [REDACTED], for documents containing valuation information or substantive analyses or discussing [REDACTED]

[REDACTED]

[REDACTED] (other than legal advice relating to the merits of a lawsuit). Smith Decl., Ex. 3 at 8 (May 17, 2022 6:57 PM Email from J. Branson to Counsel for Copyright Owners); *id.* at 5-6 (May 20, 2022 9:39 AM Email from J. Branson to M. Harris). The Copyright Owners agreed to search only for valuation documents, and the parties are currently negotiating search terms. Smith Decl., Ex. 3 at 6. But the Copyright Owners refused to search for other substantive analyses or documents discussing potential litigation, asserting that such documents “in the mailboxes of two lawyers is calling for facially privileged

information.” Smith Decl., Ex. 3 at 6 (May 19 Harris Email). They also refused to produce documents for Request 107, which seeks documents about the origin and meaning of the [REDACTED]

ARGUMENT

I. THE JUDGES SHOULD COMPEL THE COPYRIGHT OWNERS TO PRODUCE DOCUMENTS DIRECTLY RELATED TO THE COPYRIGHT OWNERS’ REBUTTAL TESTIMONY ABOUT FOREIGN LICENSING AGREEMENTS (REBUTTAL REQUESTS 33-36, 38, 40-46, 48-49)

The Copyright Owners must produce documents “directly related” to their Written Rebuttal Statement. 17 U.S.C. § 803(b)(6)(C)(v). The documents Amazon and Spotify seek meet that test. The Copyright Owners’ Written Rebuttal Statement includes testimony from Mr. Bebawi about Sony’s European licenses. *See* Bebawi WRT. That testimony falls roughly into two categories: (a) Sony’s licensing of musical works in Europe, *see id.* ¶¶ 14-30, and (b) the “European digital music market” more generally and the dynamics in that market, *see id.* ¶¶ 8-13. The Rebuttal Requests seek documents directly related to both categories.

A. Discovery About Foreign Licenses Beyond the Specific Agreements Mr. Bebawi Cites Is Directly Related to the Copyright Owners’ Written Rebuttal Statement

Mr. Bebawi discusses at length the terms of Sony’s “currently-operative pan-European agreements” with [REDACTED] *See id.* ¶¶ 14, 24-30. Mr. Bebawi suggests that these licenses are relevant to rate proposals seeking “to eliminate one or more of the rate prongs that is intended to protect publishers and songwriters.” *Id.* ¶ 6. He argues the [REDACTED]

[REDACTED] *Id.* ¶ 28. He sets forth what he says are the [REDACTED]

in the UK, Germany, Netherlands, Sweden, and France, *id.* ¶ 29, and

id. ¶ 30.

Mr. Bebawi also attempts to translate [REDACTED] [REDACTED] into a range of U.S. dollar-equivalent amounts. *Id.* ¶ 25. He similarly offers a conversion of [REDACTED] in the United Kingdom, Germany, France, Italy, Spain, and the Netherlands into U.S. dollar-equivalent [REDACTED] – to bolster the Copyright Owners’ position that the Judges should impose [REDACTED] on all service types in the United States. *Id.* ¶¶ 25-26.

The Rebuttal Requests seek documents from a subset of NMPA’s publisher members directly related to these licensing agreements and royalty terms – including licenses with performing rights organizations and collective management organizations – from Mr. Bebawi’s “‘Tier 1’ countries” (the United Kingdom, Germany, France, Sweden and the Netherlands), as well as from three other “Tier 1” countries or territories that Mr. Bebawi excluded ([REDACTED] [REDACTED] [REDACTED]). Request 33 seeks foreign licensing agreements from those countries and related documents. Requests 42, 48, and 49 seek foreign musical-works licenses and “any analyses, projections, approval memoranda, presentations, or email[s]” about “the negotiation, valuation, terms, or internal approval of the licenses” and “the rates paid for music works licensing,” as discussed in ¶¶ 5, 8-30 of Mr. Bebawi’s testimony. And Request 36 seeks “analyses, memoranda, presentations, studies, surveys, and research findings concerning [REDACTED]” that Mr. Bebawi discusses in ¶¶ 14, 23, 28 of his testimony.

The Copyright Owners’ refusal to produce these documents – other than a limited set of Sony’s documents – conflicts with the Judges’ prior orders in this proceeding and others.

First, the Copyright Owners cannot limit discovery to only Sony’s foreign licensing agreements. The NMPA – an association of publishers – is the participant in this proceeding and is sponsoring the testimony it submitted on behalf of all its members. The Judges have previously held that a trade association participant like the NMPA cannot cherry pick “[publisher]-specific material upon which they intend to rely . . . and then limit discovery from any other [publisher].” *SDARS III* 2016 Discovery Order at 7.⁴ Nevertheless, the Copyright Owners insist that, because only a Sony witness testified about licensing outside the United States, only Sony is required to produce documents related to that testimony. *See* Smith Decl., Ex. 3 at 3 (May 19 Harris Email). That is incorrect. By putting foreign licensing agreements at issue, the Copyright Owners are obligated to produce documents directly related to foreign licensing agreements from all their publisher members.⁵

Second, just as the Copyright Owners may not cherry-pick the publisher whose documents they produce, they also may not cherry-pick the countries, counterparties, or foreign

⁴ Order Granting in Part and Den. in Part Services’ Mot. to Set Specific Discovery Deadlines and Compel Copyright Owner Participants’ Adherence to Their Discovery Obligations, Dkt. No. 16-CRB-0001 SR/PSSR (2018-22) (*SDARS III*) (Aug. 23, 2016) (“*SDARS III* 2016 Discovery Order”). As the Judges explained, an alternative rule “would tilt the informational playing field, preventing the Services from presenting evidence” to rebut the Copyright Owners’ preferred narrative. *Id.*; *see also* Order Granting in Part and Den. in Part Services’ Mot. to Compel Produc. of Docs. at 4 (May 2, 2022) (“*Phonorecords IV* Order”) (holding that the Copyright Owners cannot “improperly narrow[]” the scope of discovery by having only one publisher witness testify about issues that may be common to all the publishers).

⁵ Although, in the interest of compromise, Amazon and Spotify agreed to accept searches from a narrower set of publishers with respect to U.S. discovery, *see* Smith Decl., Ex. 3 at 1-2 (May 20, 2022 9:39 AM Email from J. Branson to M. Harris), full and fair discovery into the foreign licenses that the Copyright Owners injected into the proceeding requires production from all publishers whose executives sit on the NMPA’s Board of Directors, including ABKCO, Concord, Downtown, and Reservoir. *See SDARS III* 2016 Discovery Order at 5-9; *see also* Smith Decl., Ex. 4 (May 21, 2022 Email from A. Rathbun to M. Harris).

license agreements that the Judges consider. As the Judges already stated in this proceeding, “[their] decision will rest not on anecdotal evidence standing in isolation . . . and certainly not on a particular individual’s perspective on the market as it applies to him or her” or on a “hand-picked[] segment of the market.” *Phonorecords IV* Google Order at 5.⁶ The Copyright Owners cannot put certain European licensing agreements at issue and then balk at discovery about other foreign licensing agreements. If the Copyright Owners insist on proposing European licensing agreements as benchmarks, then they have opened the door to other foreign licensing agreements: they may not limit discovery to just those benchmarks they like. *See Web V* NAB Order⁷ at 8-9 (finding participant was not precluded from seeking discovery into similar agreements that an expert did not rely on, finding that “[s]uch discovery ensures that the expert did not ‘cherry-pick’ the data or agreements on which his or her testimony rests”).

Third, the documents the Copyright Owners are refusing to produce are the type of documents the Judges have previously held are essential in considering foreign benchmarks. For example, in *Phonorecords I*, the Judges rejected DiMA and RIAA’s U.K., Japanese, and Canadian benchmarks where there was not sufficient evidence of the “full range of comparability issues,” such as the fact that rate percentages “are not applied consistently to the same revenue base,” “exchange rate differences” may cause an exaggeration of “actual revenue for copyright owners,” the “revenue base for the foreign rates is . . . subject to differing tax structures,” and “the record industry in the U.K. does not employ controlled composition clauses.”⁸ The Rebuttal

⁶ Order Granting in Part Google’s Mot. to Compel Docs. and Info. From Copyright Owners (Apr. 28, 2022) (“*Phonorecords IV* Google Order”).

⁷ Order Granting in Part and Den. in Part SoundExchange’s Mot. to Compel Discovery from the Nat’l Ass’n of Broad., Dkt. No. 19-CRB-0005-WR (2021-25) (*Web V*) (Dec. 27, 2019) (“*Web V* NAB Order”).

⁸ Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510, 4,522 (Jan. 26, 2009) (“*Phonorecords I* Final Rule”).

Requests seek documents that address these and other issues directly related to the foreign licenses the Copyright Owners have put at issue. *See* Smith Decl., Ex. 1 at 17-19. Because “[c]omparability is a much more complex undertaking in an international setting than in a domestic one,” *Phonorecords I* Final Rule at 4,522, it is vital that there is a complete record – not limited to Sony’s agreements or agreements in the particular European countries Mr. Bebawi selected – to test the Copyright Owners’ assertions that these foreign agreements are useful benchmarks. The Copyright Owners must produce documents to create that record.

B. Documents Concerning Foreign Markets Are Directly Related to the Copyright Owners’ Written Rebuttal Statement

Mr. Bebawi also testifies about what he calls the “European digital music market,” and, in particular, “the so-called ‘Tier 1’ countries”: the “United Kingdom, Germany, France, Sweden and the Netherlands.” Bebawi WRT ¶ 8. Mr. Bebawi asserts that these “Tier 1” countries are “the most comparable market[s] to the U.S. digital music market.” *Id.* He offers “background” on the European market, which he claims provides “context” for Sony’s negotiations abroad. *See id.* ¶¶ 8-13. That background includes Sony’s use of its “pan-European licensing and administration partner SOLAR” to “license the right to use [Sony’s] musical works on interactive streaming services in Europe.” *Id.* ¶ 10. It also includes what Mr. Bebawi characterizes as the “key difference” between European and U.S. markets: in Europe, “digital streaming rights are currently licensed through agreements which are freely negotiated,” and “are not licensed by national collection societies or subject to a compulsory licensing regime or any government regulated rate.” *Id.* ¶ 11. Mr. Bebawi also testifies generally about Sony’s licensing objectives in Europe, as well as purported dynamics in that market that he believes inform Sony’s negotiations. *See id.* ¶¶ 14-23.

The Rebuttal Requests seek documents – from all the publisher members, not just Sony – directly related to Mr. Bebawi’s testimony about the “European digital music market” as he defines it, as well as about digital music markets in other, comparable non-U.S. countries.

Request 45 seeks documents describing “similarities or differences between the U.S. digital music market and the European digital music market,” such as those noted in Mr. Bebawi’s testimony at ¶ 11. Similarly, Requests 35 and 43 seek documents related to “the ratio between Mechanical Royalties and Performance Royalties in jurisdictions outside the United States” or “the Music Publishers’ and European collecting societies’ views” – relevant because many of the Copyright Owners’ publisher members license with or sit on the boards of these societies – “on the allocation of royalties between Mechanical Royalties and Performance Royalties.”

Request 38 seeks documents “comparing the Mechanical Royalties actually paid to Songwriters from ex-U.S. Interactive Streaming to the Mechanical Royalties actually paid to Songwriters from U.S. Interactive Streaming,” and Request 34 seeks documents showing payments to the Copyright Owners’ members in Europe “for sound recordings and musical works, including the composition and allocation of those payments to rightsholders,” as discussed in ¶¶ 24-30 of Mr. Bebawi’s testimony.

Requests 40, 41, and 44 seek agreements between music publishers and European collecting societies, communications (including emails) and other documents related to those agreements and any licenses between those collecting societies and any interactive streaming

services,⁹ and documents showing which publishers sit on the boards of directors of any European collecting societies – all in relation to ¶¶ 11-13 of Mr. Bebawi’s testimony.

Finally, Request 46 seeks documents related to “the relationship between SOLAR and any [p]ublisher,” as discussed in ¶ 10 of Mr. Bebawi’s testimony.

The Copyright Owners’ refusal to produce documents in response to these Requests likewise runs afoul of the Judges’ prior orders. Again, the Copyright Owners cannot “hand-pick[]” a “segment of the market” in Europe and proffer it as a benchmark while simultaneously refusing to produce discovery about that market or comparable markets: “the Judges’ decision will not rest on [that].” *Phonorecords IV* Google Order at 5. Rather, if the Copyright Owners insist on introducing evidence about foreign markets, then, as the Judges held in *Phonorecords I*, “there are a myriad of potential structural and regulatory differences whose impact has to be addressed in order to produce a meaningful comparison.” *Phonorecords I* Final Rule at 4,522; *see also* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,083 (Apr. 17, 2013) (highlighting the experts’ failure to address structural and regulatory differences in Canadian and U.K. markets). Documents related to those structural and regulatory differences are precisely what the Rebuttal Requests seek. The Judges should order the Copyright Owners to produce responsive documents.

⁹ Copyright Owners have access to these licenses as board members of these collecting societies. *See, e.g., The Board of Directors*, SACEM, <https://bit.ly/38KhBtf> (last visited May 24, 2022) (noting Nicholas Galibert, Managing Director of Sony/ATV Music Publishing, and Bruno Lion, Managing director of peermusic, as directors). Though the Services have access to their own licenses with collecting societies, the Services should not be required to produce them to each other as they are not directly related to any of the Services’ Written Direct or Rebuttal Statements. *See* 17 U.S.C. § 803(b)(6)(C)(v). Moreover, the Services should not be required to produce additional discovery because of the Copyright Owners’ improper insertion of these issues into the proceeding.

II. THE JUDGES SHOULD COMPEL THE COPYRIGHT OWNERS TO PRODUCE DOCUMENTS DIRECTLY RELATED TO THE COPYRIGHT OWNERS' REBUTTAL TESTIMONY ABOUT THE [REDACTED] (REBUTTAL REQUESTS 105-108)

A. Documents Concerning the [REDACTED] Are Directly Related to the Copyright Owners' Written Rebuttal Statement

The documents Amazon seeks related to the [REDACTED] are also “directly related” to the Copyright Owners’ Written Rebuttal Statement. 17 U.S.C. § 803(b)(6)(C)(v). Two rebuttal witnesses testify about [REDACTED].¹⁰ A fact witness, Mr. Kokakis, invokes them as a reason to reject Amazon’s rate proposal. Kokakis WRT ¶¶ 8 n.5, 16, 21-22. He testifies about the [REDACTED] [REDACTED] *Id.* ¶ 22. He also testifies that [REDACTED] *Id.* ¶ 16. An expert witness, Dr. Eisenach, repeatedly cites [REDACTED] Eisenach WRT ¶ 113 & Tbl. 5 & n.178; *id.* ¶ 118 & Tbl. 8; *id.* ¶ 119 & n.185. He also relies on Mr. Kokakis’s [REDACTED] [REDACTED] *Id.* ¶¶ 113-119. He then invokes both calculations as a reason to disregard Amazon’s [REDACTED] *Id.*

Request 105 seeks analyses, projections, approval memoranda, presentations, and emails concerning the negotiation, valuation, terms, or internal approval of these license agreements. *See* Smith Decl., Ex. 1 at 27. The Copyright Owners have agreed to produce approval memoranda and run searches for “pre-execution valuation documents,” but they refuse to

¹⁰ The license agreements are [REDACTED]. *See* Smith Decl., Ex. 1 at 27.

produce other substantive analyses or “any internal discussion about potential litigation.” Smith Decl., Ex. 3 at 6 (May 19 Harris Email). Relatedly, Request 108 seeks documents memorializing or describing conversations between [REDACTED] regarding the negotiation of the agreements, specifically including [REDACTED] [REDACTED] in March 2019. *See* Smith Decl., Ex. 1 at 27. The Copyright Owners have agreed only to “consult[]” with [REDACTED] to identify “responsive, non-privileged information from his files,” but refuse to conduct any other email searches. Smith Decl., Ex. 3 at 6 (May 19 Harris Email).

Request 106 seeks analyses, memoranda, presentations, studies, surveys, and research findings concerning [REDACTED] [REDACTED] including the “calculat[ions] by [REDACTED] royalty department” that Mr. Kokakis discusses in ¶ 22 of his testimony. The Copyright Owners initially refused to produce any documents related to these calculations. Smith Decl., Ex. 2 at 48-50. They subsequently relented and agreed to search for responsive documents, provided that the parties can agree on search terms. Smith Decl., Ex. 3 at 6 (May 19 Harris Email). Those negotiations are ongoing.

Request 107 seeks documents relating to [REDACTED] [REDACTED] [REDACTED]. *See* Smith Decl., Ex. 1 at 27-28; *see also* Amazon’s Mot. to Strike at 8-12. The parties are in the process of negotiating search terms. Amazon is hopeful that the parties will be able to reach agreement, but as of today – the last day the Judges allowed for rebuttal motions to compel – the Copyright Owners have not produced

any responsive documents at all. And even if the parties reach agreement on search terms, they are at impasse on the scope of what should be considered responsive.

B. The Judges Should Compel the Copyright Owners to Produce Responsive Documents

Submitting testimony about the licenses’ effective rates but producing only one narrow category of “pre-execution valuation documents” – as the Copyright Owners seek to do – creates a misleading and one-sided record. It is well-settled that the Judges evaluate benchmarks through “an adversarial hearing predicated on full pre-hearing discovery.” *Web IV* Subpoena Order at 6.¹¹ Here, that means documents about litigation threats that influenced the negotiation and terms of the agreements, substantive analysis of the deals beyond purely monetary valuations, and documents about the contract provisions that [REDACTED].

The Judges should order the Copyright Owners to produce these categories of documents.

First, the Copyright Owners are withholding documents about the litigation threats that influenced the negotiation of these agreements and shaped their terms. The Judges have already held that such documents must be produced. *See* Order Approving Subpoenas and Granting Amazon’s Mot. to Compel at 3-4 (May 16, 2022) (ordering the Copyright Owners to search for and produce litigation threat documents related to their audiovisual licenses). That is because details about litigation threats are relevant to the “elements of value that comprise the settlement bundle.” *SDARS III* 2017 Discovery Order at 5.¹² Indeed, the Copyright Owners claim that [REDACTED]

¹¹ Order Granting in Part Licensee Services’ Mot. for Expedited Issuance of Subpoenas to Apple, Inc., Dkt. No. 14-CRB-0001-WR (2016-20) (*Web IV*) (Apr. 10, 2015) (“*Web IV* Subpoena Order”).

¹² Order Granting in Part and Den. in Part Music Choice’s Mot. to Compel SoundExchange to Produc. Audit Docs. and CABSAT Settlement Docs., Dkt. No. 16-CRB-0001 SR/PSSR (2018-22) (*SDARS III*) (Jan. 23, 2017) (“*SDARS III* 2017 Discovery Order”).

license agreements. Eisenach WDT ¶ 114. But if the evidence shows that these licenses were negotiated under threat of litigation, they are hardly evidence of [REDACTED].

Documents related to any litigation threats are particularly necessary because [REDACTED]

[REDACTED]. See Proposed Suppl. WRT of David Kokakis ¶¶ 5-10 (May 17, 2022) (attached as Ex. H to Copyright Owners’ Opp’n to Amazon’s Mot. to Strike).

The Copyright Owners’ latest objection – that any responsive documents are “facially privileged” because they are communications between two [REDACTED] lawyers, *see* Smith Decl., Ex. 3 at 6 (May 19 Harris Email) – lacks merit. The Rebuttal Requests do not seek documents containing legal advice about the merits of a lawsuit, which might be the subject of a legitimate privilege claim; they seek business documents discussing how litigation threats affected the negotiation and terms of the license agreements. Such documents are not privileged, and the Copyright Owners cannot shield them from discovery simply because [REDACTED] [REDACTED] are attorneys. It is well-settled that “[w]hen a lawyer acts merely to implement a business transaction[,] . . . the lawyer is like any other agent of the corporation whose communications are not privileged.” *Boca Investorings P’ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998); *see also Neuder v. Battelle Pac. Nw. Nat’l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000) (finding communications were not privileged where in-house counsel was “acting solely in his capacity as a business advisor” and any “legal advice” was “merely incidental to business advice”).

Second, the Copyright Owners are withholding documents containing [REDACTED] internal analyses of the licenses and their terms. Executed contracts are only one “piece of evidence” about economic value, and it is “appropriate – *even necessary* – for the Judges to consider other

*evidence and analysis to determine the true economic value of the transaction.” Web V Final Determination at 33-34. Although the Copyright Owners have agreed to produce “pre-execution valuation documents,” Smith Decl., Ex. 3 at 6 (May 19 Harris Email), that is insufficient. Any substantive analysis [REDACTED] did of these license agreements, even if not assigning a specific monetary value to a contract term, is directly related to the Copyright Owners’ testimony about these licenses. See *Phonorecords IV* Order at 3, 5 (granting motion to compel “analyses and valuations the Copyright Owners engaged in before inking a licensing agreement”). As the Judges held in *Web V*, a record is “incomplete” and “one-sided” where it lacks “documentary evidence” about elements of key agreements. *Web V* Final Determination at 34.*

Third, the Copyright Owners are refusing to produce documents related to provisions in the license agreements that [REDACTED]. Those clauses on their face [REDACTED]. [REDACTED]. See Amazon’s Mot. to Strike at 8-12. But if the Judges disagree and permit the Copyright Owners to use the agreements, Amazon is entitled to extrinsic evidence about the origin and meaning of these provisions. Such evidence bears directly on how much weight the Judges should give the agreements. See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,259 (July 8, 2002) (“[T]he agreements, at the insistence of the parties to the agreements, are not even considered precedent for setting future rates for the use of the musical works. . . . Had the Panel wished to use these rates, it needed at the very least an opportunity to examine the circumstances surrounding the adoption of the ‘no precedent’ clause.”).

The Copyright Owners cannot belatedly inject these agreements into this proceeding and then refuse to produce complete discovery into their negotiation, valuation, and terms. The

Judges should order the Copyright Owners to produce documents responsive to Requests 105-108.

CONCLUSION

The Judges should grant the Motion.

Dated: May 24, 2022

/s/ Joseph R. Wetzel

Joseph R. Wetzel
Andrew M. Gass
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, CA 94111
joe.wetzel@lw.com
andrew.gass@lw.com
Telephone: (415) 391-0600

Sarang Vijay Damle
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004
sy.damle@lw.com
Telephone: (202) 637-2200

Allison L. Stillman
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
alli.stillman@lw.com
Telephone: (212) 906-1200

Counsel for Spotify USA Inc.

Respectfully submitted,

/s/ Joshua D. Branson

Joshua D. Branson (D.C. Bar No. 981623)
Aaron M. Panner (D.C. Bar No. 453608)
Leslie V. Pope (D. C. Bar No. 1014920)
Scott Angstreich (D.C. Bar No. 471085)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
jbranson@kellogghansen.com
apanner@kellogghansen.com
lpope@kellogghansen.com
sangstreich@kellogghansen.com

Counsel for Amazon.com Services LLC

**Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.**

In the Matter of:

**DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

DECLARATION OF LILLIAN V. SMITH

(On Behalf of Amazon.com Services LLC)

1. I am an associate at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., counsel for Amazon.com Services LLC (“Amazon”) in the above-captioned proceeding.

2. I respectfully submit this declaration in connection with Amazon and Spotify’s Motion to Compel the Copyright Owners to Produce Documents About Their New Rebuttal Benchmarks. I am authorized by Amazon to submit this declaration, and I am fully familiar with the facts and circumstances set forth herein.

3. Attached as Exhibit 1 to this Declaration is a true and correct copy of Amazon and Spotify’s Set of Rebuttal Requests for Production of Documents to the Copyright Owners (May 3, 2022) (as corrected on May 16, 2022).

4. Attached as Exhibit 2 to this Declaration is a true and correct copy of Copyright Owners’ Responses and Objections to the First Set of Rebuttal Requests for Production from Amazon.com Services LLC and Spotify USA Inc. (May 13, 2022).

5. Attached as Exhibit 3 to this Declaration is a true and correct copy of the May 20, 2022 Email chain between Joshua Branson and Marion Harris.

6. Attached as Exhibit 4 to this Declaration is a true and correct copy of the May 21, 2022 Email chain between Anna Rathbun and Marion Harris.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: May 24, 2022
Washington, D.C.



Lillian V. Smith (D.C. Bar No. 252516)
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900
Fax: (202) 326-7999
lsmith@kellogghansen.com

Counsel for Amazon.com Services LLC

Exhibits 1-4

*Restricted – Subject to Protective Order in
Docket No. 21-CRB-0001-PR (2023-2027)
(Phonorecords IV)*

Proof of Delivery

I hereby certify that on Tuesday, May 24, 2022, I provided a true and correct copy of the Amazon and Spotify's Motion to Compel the Copyright Owners to Produce Documents About Their New Rebuttal Benchmarks (PUBLIC) to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Google LLC, represented by Gary R Greenstein, served via E-Service at gggreenstein@wsgr.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

Signed: /s/ Joshua D Branson